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No. 97-391

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

ARTHUR CALDERON, Warden; TEENA FARMON, Warden of the Central California Women's Facility; C.A. TERHUNE, Director, California Department of Corrections; DANIEL E. LUNGREN, Attorney General, *Petitioners*,

v.

TROY A. ASHMUS, of himself as an individual and on behalf of himself and all others similarly situated, *Respondent*.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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A. The State's Immunity from Suit

1. Ashmus variously refers to state officials' asserted views on the application of Chapter 154 as "misleading," "erroneous," "unfounded," "wrongful," "incorrect," and a "misinterpret[ation]." See, *e.g.*, Resp. Br. 18, 19, 23, 25, 35. These characterizations—even assuming they were accurate—demonstrate no basis for defeating the Eleventh Amendment.

The *Ex parte Young* doctrine operates to "strip" a state official of Eleventh Amendment immunity "only where the underlying authorization upon which the named official acts is asserted to be *illegal*." *Papasan v. Allain*,

478 U.S. 265, 277 (1986) (emphasis added); *Ex parte Young*, 209 U.S. 123, 159 (1908) ("[T]he officer is simply prohibited from doing an act which he had no legal right to do"). By no stretch of the imagination can state officials' "assertions" of their understanding of the state of the law constitute an "illegal" act. Quite to the contrary, such assertions—no less than any inmate's competing assertions—are integral to the adversarial process. See *Worcester County Trust Co. v. Riley*, 302 U.S. 292, 298-300 (1937) (state officers who "seek . . . a judicial determination" on the state's behalf perform an official duty, the restraint of which is prohibited by the Eleventh Amendment). Defending presumptively valid criminal judgments from collateral attack with good faith legal arguments is scarcely something state officials "have no legal right to do." See Br. for Pet. 5.[1] And state officials' entitlement to be free of preemptive judicial intervention in that regard does not depend on the extent to which a court thinks their position to be correct, for "at least insofar as injunctive relief is sought, an error of law by state officers acting in their official capacities will not suffice to override the sovereign immunity of the State where the relief effectively is against it." *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 113 (1984) (citing *Larson v.*

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1. Inmates properly enjoy a similar measure of latitude when challenging their state judgments. Thus, although Ashmus was plainly mistaken, for example, when arguing that California's review mechanism is not "unitary" in structure, see Pet. App. 65a, when contending that Chapter 154 conditions state compliance on the existence of competency standards that "require previous experience in habeas corpus litigation," see *id.*, at 19a, and when insisting that he had evaded application of the AEDPA's amendments to Chapter 153 simply by making his request for appointment of federal counsel before April 24, 1996, compare *id.*, at 26a-27a, 42a, with *Ashmus v. Calderon*, 977 F. Supp. 987, 988, and n. 3 (ND Cal. 1997), he did not thereby act "illegally." He simply erred in his interpretation of federal law.

Domestic & Foreign Commerce Corp., 337 U.S. 682, 695 (1949) ("we . . . reject[] the argument that official action is invalid if based on an incorrect decision as to law or fact, if the officer making the decision was empowered to do so") (suit against federal officer). "Any resulting disadvantage to the plaintiff [is] 'outweigh[ed]' by 'the necessity of permitting the Government to carry out its functions unhampered by direct judicial intervention'"—a need that is, "[i]f anything, . . . *even greater when questions of federalism are involved*." *Pennhurst*, at 113-114 (emphasis added); see also *id.*, at 110-112, and nn. 20, 22.

2. Ashmus's next tack is to blame state officials' assertions for "creat[ing] substantial uncertainty and concern about what procedures would govern" federal proceedings, which uncertainty in turn allegedly "created an untenable dilemma" for death-sentenced prisoners: Supposedly forced to "gamble" that Chapter 154 either would or would not apply, prisoners would either file or not file within the provision's 180-day limitations period. *Id.*, at 3, 16, 35. Ashmus invokes what he calls the District Court's "undisputed factual findings" that state officials' assertions had "coerced" and "intimidate[d] class members into complying with Chapter 154." *Id.*, at 9, 10, 13, 18-19, 22. This description of events is erroneous, and the theory it hatches for stripping state officials of their Eleventh Amendment protections is doctrinally incoherent.

First of all, it is manifest that any sense of "uncertainty" experienced by inmates could only reasonably stem from *Congress's enactment* of Chapter 154, for a state's capacity to qualify under its provisions hinges not on what state officials might say about the subject to the United States Senate or inquiring journalists, see Record Doc. Nos. 6-7 and Exhs. 2-3, but on the single contingency prescribed by Congress: "if the State meets certain conditions" in the structuring of its capital review procedures. *Lindh v. Murphy*, 117 S. Ct. 2059, 2063 (1997). See

Death Row Prisoners of Pennsylvania v. Ridge, 948 F. Supp. 1258, 1265-1266, 1274 (ED Pa. 1996) (identical suit brought against state officials who declined to assert *one way or the other* whether they believed Chapter 154 applied). Presumably, state officials' views on the question of state compliance—like those advanced by any prisoner—would be carefully considered by federal courts; however, neither side's assertions will be determinative of anything until they receive judicial endorsement. See Pet. App. 33a ("Congress . . . has entrusted to the federal judiciary the responsibility and obligation for determining whether Chapter 154 applies").[2/]

Moreover, notwithstanding Ashmus's claims and the District Court's purported "findings," the record contains *no "factual" showing whatsoever* that any death row inmate in California ever took any action, or failed to take any action, on account of anything state officials said about the applicability of Chapter 154. As for Ashmus's insistence that his mischaracterization has gone "undisputed" by state

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2. As Ashmus once acknowledged, "The problem confronting plaintiffs was this: At the time we filed this lawsuit, the day that this legislation was signed, *the time was running as soon as President Clinton signed the bill.*" SER 9 (emphasis added); compare Resp. Br. 20, n. 7. And he further acknowledged that no inmate's interest in "certainty" would have been furthered if the state had *withheld* its views in favor of "waiting until people missed the six-month statute of limitations and then saying, 'Aha, we've got you.'" SER 103. In short, state officials' silence could confer neither the "prompt *judicial* determination" nor the "definitive *judicial* answer" Ashmus demands. Resp. Br. 5, 16 (emphases added). And whether Chapter 154 is "self-executing," whether a state bears any "burden" of demonstrating compliance, and whether there are circumstances under which the Chapter's provisions might be "waived," are beside the point. *Any* party to litigation has the capacity to make it less contentious in any number of respects, or even to moot it entirely—*e.g.*, by dismissing suit, admitting liability, pleading guilty, or conceding some lesser point; but none of this converts adversaries into "lawbreakers," for *judicial* process exists to resolve any *disputed* matters that remain.

officials, we can only observe that this brief will mark the *fourth* time we have corrected his error. See Pet. Reply to Br. in Opp. to Cert. 2, n. 1; State's Supp. Br. on Appeal 8; State's Reply Br. on Appeal 4-5; see also State's Opening Br. on Appeal 29, n. 6. At any rate, for all his references to the "extensive, and unchallenged, factual finding" that supposedly went on below, Resp. Br. 6, 9, 17, 22, he does not dispute that, as the Ninth Circuit correctly discerned, "the basis for the injunction" against state officials' advocacy is simply "the district court's determination that California does not comply with Chapter 154," Pet. App. 8a-9a, not any purported "factual findings about the nature and effect" or "consequences" of state officials' conduct. And whether California qualifies under Chapter 154 is, as even Ashmus appears to acknowledge, a "legal question," not a factual one. Resp. Br. 12, 16.

Accordingly, the Ninth Circuit's own discussion of the "continuing or impending violation of federal law" supposedly committed by state officials likewise relies on no "factual findings," but proceeds almost entirely from that court's misunderstanding of how federal counsel are appointed and how Chapter 154 might affect inmates' ability to amend their petitions or secure stays of execution. Pet. App. 10a-12a. Ashmus, understandably, makes no effort to defend the Ninth Circuit's thoroughly mistaken analysis of those matters. See Br. for Pet. 28-31. Instead, describing his "hardship" of "uncertainty" in far less convoluted terms, he claims he was confronted with only two choices: (1) initiating this lawsuit or (2) "gambling" on the law's application by filing a petition at a time that might ultimately prove to be either (a) late or (b) as much as six months more "timely" than legally required. Resp. Br. 3, 16, 29. But at this stage of Ashmus's briefing, he assiduously overlooks his third option, the existence of which he has repeatedly conceded and the effectiveness of which he knows from personal experience: He simply could ask his habeas judge to rule upon the applicability

of any provision of the AEDPA about which he feels unsure. See *Ashmus v. Calderon*, 977 F. Supp., at 988, n. 3; Resp. Opp. to Pet. for Cert. 7, 16, n. 10. Ashmus eventually goes on to acknowledge that other option, at which point he is forced to dispute its significance to application of *Ex parte Young*'s exception.

3. In Ashmus's view, see Resp. Br. 14-34, a private party's ability to strip state officials of their Eleventh Amendment immunity under *Young* does not depend on whether resort to that doctrine is *necessary* to permit federal courts to vindicate federal rights and hold state officials responsible to the supreme authority of the United States; rather, he argues, it is sufficient that the suit against state officials "serves" that objective by "challeng[ing] . . . their interpretation of the federal law," and thereby presenting an occasion "to declare the meaning of federal law with which they must comply." *Id.*, at 18, 21-22. With that understanding, Ashmus concedes that the precise legal question on which he and state officials disagree—whether the capital review mechanism in place in California since June of 1989 is a qualifying mechanism within the contemplation of Chapter 154—is one that federal courts can and will resolve, as appropriate, in the regular course of adjudicating any habeas proceedings in which it actually arises. Ashmus simply insists that the availability of this "alternative federal forum," *id.*, at 31-33, and n. 15, for enforcing federal law is inconsequential to *Young*'s application. Ashmus is again mistaken.

"'*Ex parte Young* was the culmination of efforts by this Court to *harmonize* the principles of the Eleventh Amendment with the effective supremacy of rights and powers secured elsewhere in the Constitution.'" *Pennhurst*, 465 U.S., at 105 (quoting *Perez v. Ledesma*, 401 U.S. 82, 106 (1971) (Brennan, J., concurring in part and dissenting in part)) (emphasis added). The scope of the doctrine is

thus defined by its salutary purpose: to "ensure[] that state officials do not employ the Eleventh Amendment as a means of avoiding compliance with federal law." *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993). The circumstances justifying invocation of the *Ex parte Young* doctrine are clear: *"when absolutely necessary"* to vindicate federal law. *Fenner v. Boykin*, 271 U.S. 240, 243 (1926), *quoted in Younger v. Harris*, 401 U.S. 37, 45 (1971).

Thus, where regular legal process—be it habeas corpus process or any other variety of federal adjudication to which the state is a party—will necessarily provide resolution of any question of federal law actually implicated in that dispute, "vindication" of federal law will occur as a matter of course, "erroneous" advocacy by state officials can have no "injurious" consequences, and the rationale for allowing a separate suit under *Young*'s exception simply does not obtain. In such a situation, there is manifestly no risk that the Supremacy Clause will be deprived of its "life," *Green v. Mansour*, 474 U.S. 64, 68 (1985), or that state officers will "employ the Eleventh Amendment as a means of avoiding compliance with federal law," *Puerto Rico Aqueduct*, 506 U.S., at 146.

The flaw of the Minnesota law at issue in *Young*—and the reason this Court authorized suit against the State Attorney General—was that it operated "in effect, to close up all approaches to the courts, and thus prevent any hearing upon" its validity. *Young*, 209 U.S., at 148. That is the holding of *Young*, and it supplies the precise basis on which that decision has been subsequently distinguished in what otherwise would have been analogous contexts. See *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 217-218 (1994); *Reisman v. Caplan*, 375 U.S. 440, 446-450 (1964).[3]

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3. Ashmus misreads *Young* when he asserts "Only after conclud-

To be sure, in those limited circumstances where *Ex parte Young* actually lies, the suit will doubtless perform a valuable interpretive function. See *Idaho v. Coeur d'Alene Tribe of Idaho*, 117 S. Ct. 2028, 2036 (1997) (principal opinion of Kennedy, J.), *cited in* Resp. Br. 21. But a party's "request that the federal court interpret a federal statute," Resp. Br. 24, has never been deemed sufficient basis for suit under the *Young* exception. *Parden v. Terminal Railway of Alabama Docks Dept.*, 377 U.S. 184, 186 (1964) ("Nor is the State divested of its immunity 'on the mere ground that the case is one arising under the Constitution or laws of the United States'"). Indeed, in the absence of a bona fide cause of action, a request to construe federal law will not even establish federal subject matter jurisdiction. See *California v. Sierra Club*, 451 U.S. 287, 298 (1981) (refusing to construe Rivers and Harbors Appropriation Act of 1899).[4]

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ing that the federal court had subject matter jurisdiction and that the State law was unconstitutional did this Court determine whether the Eleventh Amendment shielded the State officials from federal judicial power." Resp. Br. 32, n. 15. This Court in *Young* did not determine that Minnesota's railroad rates were unconstitutionally confiscatory; rather, it struck down the law "without regard to the question of the insufficiency of those rates." 209 U.S., at 148. Indeed, upon further exploration and review of the question (the opportunity for which wisely was not foreclosed by an injunction against further advocacy), it was determined that the rates prescribed by the state were substantially *valid*. See *Minnesota Rate Cases*, 230 U.S. 352, 380, 465-472 (1913).

4. In these proceedings, we need not question, and thus have expressly declined to question, whether the Declaratory Judgment Act creates a free-standing "cause of action," inasmuch as the instant suit against state officials is barred in all events by the Eleventh Amendment. Br. for Pet. 22; compare Resp. Br. 7, n. 3. For similar reasons, we also decline Ashmus's invitation to debate whether the *Young* doctrine—in those situations where it *does* apply—"create[s] a separate and independent cause of action," an issue on which Ashmus and some commentators would apparently disagree. Compare Resp. Br. 21, n. 8, with P. Bator, D. Meltzer, P. Mishkin, & D. Shapiro, Hart & Wechsler's The Federal Courts and the Federal System 1181 (3d ed. 1988). Neither matter will resolve what is in dispute here: whether state officials "violate" federal law by expressing their understanding of it, and whether, notwithstanding the Eleventh Amendment, a separate suit against state officials is necessary to "correct" the "harm" that assertedly results from state officials' understanding of Chapter 154 in particular. See Resp. Br. 22 (where Ashmus focuses on "the consequences of the State officials' conduct" in his effort to demonstrate *Young*'s applicability) with *id.*, at 23, n. 11 (where Ashmus oddly suggests that state officials' "actions" and the "harm" assertedly caused "by those actions" are matters affecting "justiciability" but *not* application of *Young*); see also *id.*, at 21 n. 8 (where Ashmus suggests, even more oddly, that distinguishing the enforcement or adjudicatory role of federal courts from the adversarial role of state officials implicates "justiciability questions" (such as ripeness), but not "*Young* analysis"); *id.*, at 23, n. 11 (same).

That Chapter 154's application can be decided in the ordinary course of habeas litigation is significant not so much because habeas procedures provide an "adequate legal *remedy*" for redressing any "violation" of federal law; rather, it is because those procedures provide the occasion for a federal court to correctly apply federal law *in the first instance*. Compare Resp. Br. 32 n. 16 with State's Opening Br. on Appeal 48.[5]

Ashmus argues that *Young*'s narrow exception must extend beyond its "necessary" application; otherwise, he claims, "suits for declaratory and injunctive relief against

5. Because giving effect to the Eleventh Amendment in this case will not "shield" state officials' understanding of federal law from federal review, Resp. Br. 21, it cannot undermine the "acknowledged . . . importance of having federal courts open to enforce and interpret federal rights." *Coeur d'Alene Tribe*, 117 S. Ct., at 2045-2046 (concurring opinion of O'Connor, J., joined by Scalia and Thomas, JJ.). Those habeas courts that will be called upon to construe and apply Chapter 154 are no less "federal" than the court in which Ashmus filed the instant suit. Compare Resp. Br. 28 (mistakenly accusing state officials of not wanting to be held responsible to federal law "in any case other than Mr. Ashmus's").

State officials would never be permitted because there is always an alternative forum available for resolving the dispute." Resp. Br. 28. Not surprisingly, Ashmus does not identify the federal forum he believes will "always" be available; nor, of course, does he identify the particular federal forum that supposedly was available to the railroad's shareholders in *Young*. See 209 U.S., at 146, 147 (describing how Minnesota law operated "to preclude a resort to the courts (either state or Federal) for the purpose of testing its validity" as effectively as if the law had expressly "prohibited the company from seeking judicial construction of laws which deeply affect its rights"). Unlike the imminent harm of illegal arrest, prosecution, or deportation (the "consummation" of which executive officials are in a position to effect, but which no victim is required to "await," Resp. Br. 29-30), a habeas court's impending construction of Chapter 154 is not a "hardship" from which parties can demand "preventive relief."

Ashmus believes that the only proposition relating to "necessity" that a would-be *Young* plaintiff must demonstrate is a truism: the "need" to keep federal law "supreme." Resp. Br. 27-28. The implications of this theory are striking: For every point of federal law on which a state and any private party might disagree, the basis for an entirely new lawsuit would appear. See Brief for State of Maryland et al. as *Amicus Curiae* 13-14. This Court has never endorsed such an extravagant reading of *Ex parte Young*. See *Parden*, 377 U.S., at 186; *Papasan*, 478 U.S., at 277 (observing that *Young* has been "tailored . . . precisely"). It should not do so now, for allowing suits to be brought against state officials whenever an unanswered question of federal law looms—and without regard to whether stripping them of the protections afforded by the Eleventh Amendment is "*absolutely necessary*" to vindicate the federal judiciary's interpretive function—would no longer "*harmonize*" competing constitutional commands in

the manner *Young* designed. One casts no doubt on the "need" to keep federal law supreme by recognizing the extreme infrequency with which private parties "need" to resort to *Young* for that purpose.

4. Ashmus next argues that his suit *is* necessary as required by *Young*. He makes two points: He first argues that precluding all but one district court from considering Chapter 154's application is essential to overcoming those "substantive and procedural obstacles" that lay in his path to securing a ruling that provides him with the measure of "definite[ness]," "predictability," "uniform[ity]," "certainty," and "finality" he desires. Resp. Br. 35-37. He does not dispute that any habeas petitioner who wants a ruling on Chapter 154's applicability can obtain (and ordinarily rely upon) one from the court before which that prisoner's habeas proceeding is pending; however, he perceives—correctly—a "significant risk" that other courts will disagree with the conclusion reached in this case if given the opportunity to hear the state's views. *Id.*, at 35-36, 40. He therefore insists a single suit that secures a single legal ruling on this "question of grave importance," made reviewable only once, and never thereafter subject to further consideration by *any* court, at *any* level, is the "only effective remedy" for his purposes. *Id.*, at 15, 36-37. Second, he claims that death row inmates who have yet to exhaust state remedies, unlike those who have moved on to federal court, have "no recourse other than the present suit to obtain a timely clarification" of Chapter 154's application. *Id.*, at 36. These points are unavailing.

Ashmus's first contention about the perceived inadequacy of rulings attainable in individual habeas proceedings is sharply inconsistent with his view that habeas's procedural regime is not too "modest" or "limited" for his purposes. Compare Resp. Br. 33-34 (asserting that habeas "is not a 'less intrusive remedy'") with *id.*, at 36 (discussing "the limited remedies available in the context

of individual habeas cases"). In that regard, Ashmus earlier seemed to suggest that because habeas has itself sometimes been characterized as "*Ex parte Young*-like,"[6] it provided him with a pre-existing basis for subjecting state officials "to the full remedial powers of a federal court." *Id.*, at 33, and n. 17. Presumably, Ashmus believes this responds to our contention that the *Young* doctrine cannot be used to circumvent habeas's carefully crafted limitations. *Id.*, 33-34; see Br. for Pet. 38-41. Ashmus, however, cites no authority declaring that a habeas court's "remedial power" extends to dictating which legal arguments state officers will be allowed to make when defending the state's interests in "any state and federal proceeding" where their arguments could matter. No such authority exists, of course, for a more "far-reaching and invasive form of relief," Resp. Br. 25, would be difficult to imagine. Cf. *Printz v. United States*, 117 S. Ct. 2365, 2384 (1997) (federal "commands" to state officers "are fundamentally incompatible with our constitutional system of dual sovereignty").[7]

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6. "[T]he habeas theory of a civil suit against the bad jailer fits perfectly with the *Ex parte Young* fiction." *Brennan v. Stewart*, 834 F.2d 1248, 1252, n. 6 (CA5 1988), *quoted in Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114, 1182, n. 62 (1996) (Souter, J., dissenting, joined by Ginsburg and Breyer, JJ.); see also *id.*, at 1133, n. 17 (opinion of Rehnquist, C.J., for the Court).

7. More generally, Ashmus apparently believes that if a state officer can "be brought into federal court" for *one* purpose, Resp. Br. 30-31; see also *id.*, at 14 ("Once federal jurisdiction is properly invoked . . . under the various requirements for declaratory and injunctive relief"), the protections afforded by the Eleventh Amendment are defeated for *all* purposes, leaving the officer thereafter vulnerable to any type of suit for any form of relief. *Id.*, at 14, 21, n. 8, 27, 30-31. This view—like Ashmus's suggestion that Congress, by failing to expressly "foreclose" the instant suit, demonstrated its "intent to permit" *increased* prisoner litigation under the AEDPA, *id.*, at 34, n. 18—finds no support in law, history, or reason.

Thus, Ashmus is quite correct when he later observes that the habeas regime would have presented him with a number of "substantive and procedural obstacles" to obtaining a ruling as terminally "binding" as the one he secured in this case. But this observation defeats his resort to *Young* rather than advances it, for circumventing attendant legal processes (and thereby foiling the protections and recourse they afford one's opponents in litigation) is not a permissible objective of suits brought under *Ex parte Young*. See *Seminole Tribe*, 116 U.S., at 1132-1133 (majority opinion) (circumvention prevented by barring "alternative" *Young* suit); *id.*, at 1183 (dissenting opinion) (proposing that circumvention be avoided by allowing suit under *Young*, but keeping it subject to all applicable procedural limitations).

As for Ashmus's second point, we understand him to argue that although prisoners who have yet to exhaust their state remedies are prohibited from invoking the power of the federal courts to challenge the lawfulness of their confinement, they nonetheless should be entitled under *Ex parte Young* to contest which federal procedures would govern the very federal challenge they are not allowed to bring. We think this argument is defeated by the force of its own expression.

5. Ashmus wonders "precisely how California's sovereign interests are more appreciably affected by this litigation" than would have been the case if he and other inmates had simply adhered to the habeas regime. Resp. Br. 24. He would not raise such a question if he understood that "the Eleventh Amendment is concerned not only with the States' ability to withstand suit, but with their privilege not to be sued," and that every time a state is subjected "to the coercive process of judicial tribunals at the instance of private parties" it is denied "the respect owed [it] as [a] member[] of the federation." *Puerto Rico Aqueduct*, 506 U.S., at 146, and n. 5. That indignity is only

compounded where, as here, the unauthorized suit is used to defeat the very "substantive and procedural" provisions of law which, though appearing as "obstacles" to Ashmus, had afforded California the precise measure of protection to which Congress, being mindful of comity and federalism in ways one could not expect of death row inmates, determined all states are entitled. And the most egregious affront in this case, of course, is that, for nearly two years, California's officers have been restrained, under pain of contempt, from advocating the state's position on an important question of law in any proceeding except the contrivance that is this lawsuit.

None of the foregoing indignity can be justified by reference to a purported concern for "'reduc[ing] the cost and delay of civil litigation.'" Pet. App. 13a; see also Resp. Br. 27. In the first place, "Policy, no matter how compelling, is insufficient, standing alone, to waive [sovereign] immunity." *Library of Congress v. Shaw*, 478 U.S. 310, 321 (1986). Moreover, even if "judicial economy" were a relevant consideration, no one genuinely interested in "expedit[ing]" the course of litigation—a claim which, when made by a death row habeas petitioner, Resp. Br. 3, 34, must be viewed with healthy skepticism[8]—would propose supplanting the "swift, flexible, and summary" design of the habeas corpus regime with the cumbersome machinery of complex civil litigation strategies. See *Preiser v. Rodriguez*, 411 U.S. 475, 495-496 (1973). The latter achieves no economy over the former, as a comparison of Ashmus's own experiences plainly illustrates: When he grew uncertain about the proper application of amended Chapter 153, Ashmus proceeded

8. See Judicial Conference of the United States, Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Committee Report and Proposal 2 (Aug. 23, 1989) (observing that death row inmates, at least historically, have had "no incentive to move the collateral review process forward until an execution date is set").

by motion in his habeas proceeding, to which the court responded in just six days, and without any hearing, by issuing a 9-page order devoted entirely to the substance of Ashmus's concerns. 977 F. Supp., at 987-995. By contrast, the "§1983/*Ex parte Young*" lawsuit Ashmus fashioned to secure a "speedy" and "convenient" construction of Chapter 154 consumed a three-month period of proceedings in the District Court, requiring multiple appearances, and culminating in a 29-page order, only 7 pages of which actually address the merits of whether California qualifies under the new measure. Compare 935 F. Supp., at 1048-1076 with *id.*, at 1069-1075.[9]

6. Finally, Ashmus's briefing contains a miscellany of misstatements and distortions. Although none seems likely to prejudice the outcome of these proceedings, four are sufficiently misleading as to merit prompt correction.

a. Ashmus asserts that we "did not invoke the [Eleventh Amendment] defense during the declaratory judgment and preliminary injunction proceedings," and he implies this might explain why "[t]the District Court did not address the Eleventh Amendment in its order." Resp. Br. 7 n. 2. The suggestion is specious (not to mention pointless, *Pennhurst*, 465 U.S., at 99, n. 8), for (as Ashmus notes) we asserted the defense *twice* in our pleadings,

9. Ashmus certainly achieved no economy when he effectively forced the state to litigate Chapter 154's applicability against *every* inmate potentially affected by it, including those as to whom we might have elected, in the exercise of our discretion, not to press the point; such cases might be those in which we discern that Chapter 154 would not significantly affect the outcome or, for other reasons, we think it prudent to allocate the public's resources to demonstrating different bases for rebuffing inmates' collateral attacks (*e.g.*, their lack of merit, failure of exhaustion, or procedural default). Cf. 28 U.S.C. §2254(b)(2). Ashmus might not like it that the state would "pick and choose" to litigate in this way, SER 103, but the prerogative to do so is one of the fundamental interests and functions of any sovereign. Cf. *United States v. Mendoza*, 464 U.S. 154, 159-161 (1984).

and—as Ashmus fails to note—the District Court's own questions for counsel during the proceedings evinced an *explicit* understanding of our "claim that the 11th Amendment bars this suit." Record, Doc. No. 44, p. 1, ¶A.1; see also SER 52-53. The court's failure to address that defense must find its explanation elsewhere.

b. Ashmus mistakenly believes that "State officials advocated three different interpretations of how Chapter 154 applied to capital habeas petitioners." Resp. Br. 4, n. 1. But we never urged that any inmate's petition be deemed already "barred" as of April 24, 1996, and we told William Kirkpatrick in particular of our view that he "would have 180 days from April 24, 1996, . . . or October 21, 1996, within which to file his petition." Record, Doc. No. 15, Exh. 6 (filed Apr. 24, 1996), pp. 15, 18, cited in Resp. Br. 4, n. 1. In our very first pleading filed in this case, we told Ashmus the same thing: "no later than six months from April 24, 1996 (i.e., by October 21, 1996)." *Id.*, Doc. No. 11 (filed Apr. 29, 1996), p. 3, cited in Resp. Br. 4, n. 1. The 180-day limit applied to both Kirkpatrick and Ashmus because the convictions of each had been affirmed on or after June 6, 1989, such being the date on which the state's qualifying mechanism became effective. See also Pet. App. 30a-31a. By contrast, because the judgment of inmate Richard Odle pre-dated June 6, 1989, the state immediately disavowed any intention to seek application of Chapter 154 in his case. See Record, Doc. No. 15, Exh. 7 (filed Apr. 29, 1996), p. 5, n. 3, cited in Resp. Br. 4, n. 1. The state having never urged a different result in any case involving a pre-June 1989 judgment, and the judgments of both Ashmus and Kirkpatrick in particular having been affirmed *after* June 6, 1989, the pleading we filed in Odle's case did not, and logically could not, "later amend" anything we had said earlier to Kirkpatrick or that same day to Ashmus. And although the significance of the June 6, 1989, cut-off was evident to Ashmus from the outset, see *id.*, Doc. No. 6, p. 13 (Apr. 24, 1996);

id., Doc. No. 18 (May 1, 1996), pp. 7-8, we served him with repeated, consistent "reminders" about it, starting from our very first appearance in the District Court. SER 18-19 (May 2, 1996); see also Record, Doc. No. 40 (May 17, 1996), p. 7, n. 5.

c. Ashmus claims that we "essentially admit that [our] objective is to procure the benefits of Chapter 154 without regard to its eligibility requirements when [we] argue that petitioners can eliminate any uncertainty over Chapter 154 by complying with the chapter's timetables until the question is finally resolved." Resp. Br. 22, n. 10. What we actually said, of course, is that inmates can resolve their uncertainty by simple motion, Br. for Pet. 16, 27, 32-34, 38, and can do so *before* filing any petition they think to be "premature," but we had also assured Ashmus that if he nevertheless elected to file a petition within the 180-day period "out of abundance of caution" we would not later oppose any timely effort to modify its contents if that course were to prove necessary. *Id.*, at 30, n. 7.

d. Ashmus contends that our continuing demand for the immediate restoration of our adversarial rights "is inconsistent with [our] approach in the Ninth Circuit," where, he reports, we "had urged the court to resolve the dispute in a manner that eliminated the possibility of obtaining 'divergent opinions' about the applicability of Chapter 154." Resp. Br. 24, n. 12. In truth, we told the Ninth Circuit that the District Court's unconstitutional injunction "must . . . be vacated and the cause remanded with instructions to dismiss," State's Supp. Br. on Appeal 13, thereby allowing us to pursue the concededly "significant" prospect, Resp. Br. 40, that other district courts would accept our view respecting Chapter 154's application to California judgments—an opportunity that had been previously foreclosed to us when Ashmus hijacked all litigation on the issue from the several courts in which it otherwise would have been resolved long ago. Also concerned with the delay Ashmus's tactics had caused, we

offered to stipulate to early issuance of the mandate to facilitate immediate reconsideration of the merits by the District Court *in Ashmus's habeas proceeding*, and, if necessary, by the Ninth Circuit in an expedited appeal—a course that, however imperfect and whatever its outcome, at least would have ended the District Court's ongoing violation of our rights secured by the First and Eleventh Amendments. State's Supp. Br. on Appeal 13-15.

B. The State's Freedom to Advocate

In response to our First Amendment claim, Ashmus largely reprises the argument, first advanced in his opposition to our petition for certiorari, that the injunction against state officials' advocacy is authorized by the All Writs Act. Resp. Br. 39-40. This argument merits no extended response because, as we explained in our reply to Ashmus's opposition, the All Writs Act played no part whatsoever in the decisions of the district or circuit courts, and it could provide, at any rate, no more valid a basis than does *Ex parte Young* for circumventing prescribed procedures that inmates happen to find "inconvenient" or "less appropriate." Pet. Reply to Br. in Opp. to Cert. 8-9 (citing *Pennsylvania Bureau of Correction v. United States Marshals Service*, 474 U.S. 34, 43 (1985)).

Ashmus insists the injunction "was not issued because of the content of the State officials' expression," and suggests that its effect on the state's ability to express the view it actually holds about Chapter 154 is simply "incidental[]" to the injunction's aim: preventing state officials from "forum shop[ping]" and engaging in "repetitive," "duplicative," "piecemeal," "bad faith relitigation" in "every courtroom in the land." Resp. Br. 38-41; *id.*, at 14, 24, n. 12, 27, 37. Ashmus, however, would do well to recall that until he filed this suit, the only party facing any prospect of "a multiplicity of suits," *id.*, at 27, was the state; and obviously no portion of that "great burden on the federal

judiciary's limited resources" (about 145 habeas suits), *id.*, at 40, had been instigated *by* the state. By contrast, each inmate was then party to just one suit (the habeas proceeding he or she initiated), and thus no one of them faced *any* risk of "divergent" rulings until Ashmus took it upon himself to make every inmate a party to this second suit before a different court, a circumstance that shows his later demand for "uniformity" to be but the crudest form of bootstrapping. The state was (and remains) content to have all habeas-related litigation resolved in those courts before which each habeas suit is (and always had been) pending. It therefore ill behooves Ashmus—who, using self-styled techniques of case "consolidat[ion]," *id.*, at 39, undertook to remove litigation from scores of other courts into the one court *he* believed could "best resolve" Chapter 154's applicability, Record, Doc. No. 9, p. 3—to accuse *us* of forum shopping or bad faith. Neither should Ashmus deny that the injunction he sought, and which was issued and upheld on the explicit rationale that it prevents state officials from expressing a position we otherwise would be "free to assert," Pet. App. 20a, 77a-79a; see Resp. Br. 21-22, is a content-based, viewpoint-specific prior restraint of expressive freedom.

Finally, we plainly claim no "constitutional entitlement to divergent rulings," *id.*, 17, 28, nor do we demand access to "every courtroom in the land," *id.*, at 41. We simply seek the "'use of established adjudicatory procedures.'" See Br. for Pet. 42. Like Ashmus himself, we recognize the "significant" likelihood, Resp. Br. 40, that courts within the Ninth Circuit will, if given the chance, ultimately conclude that Chapter 154 neither imposes a time limit for appointing state counsel nor requires the elimination of all judicial discretion in the administration of counsel standards, and that, *as a matter of state law*, California's counsel standards are provided by "rule of court or statute" and no practice or procedure of the state supreme court precludes the presentation of potentially

meritorious collateral claims that "may exist outside the record." See Pet. App. 18a-20a.[10] The best chance for discovering the truth about California's compliance with Chapter 154 will occur after the injunction is lifted, this suit is dismissed, and established adjudicatory procedures are put to the task for which they are designed.

Conclusion

The judgment of the Court of Appeals should be vacated and the case remanded to that court with directions that the action be dismissed by the District Court.

Respectfully submitted,

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10. Ashmus asserts that "no state forum is available for resolving" Chapter 154's applicability. Resp. Br. 26, n. 13. Effective January 1, 1998, however, the California Supreme Court may answer questions of law certified to it by, inter alia, a federal appeals court, provided that an answer is requested, the question may be determinative of a pending cause, and there is an absence of controlling state precedent. Cal. Rules of Court, rule 29.5. As noted above, determining a state's compliance with Chapter 154 implicates several questions of *state* procedural law. If the Ninth Circuit sees fit to avail itself of the assistance Rule 29.5 now provides, see *Arizonans for Official English v. Arizona*, 117 S. Ct. 1055, 1073-1075 (1997), it will likely gain a better understanding of California law than is reflected in its decision in this case.